No. 282. 43.

Brief of Davidge & Perry for P. C.

Filed April 25, 1898.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

No. 282.

THE WASHINGTON GAS LIGHT COMPANY, CHARLES B. BAILEY AND JOHN LEETCH, PLAINTIFFS IN ERROR.

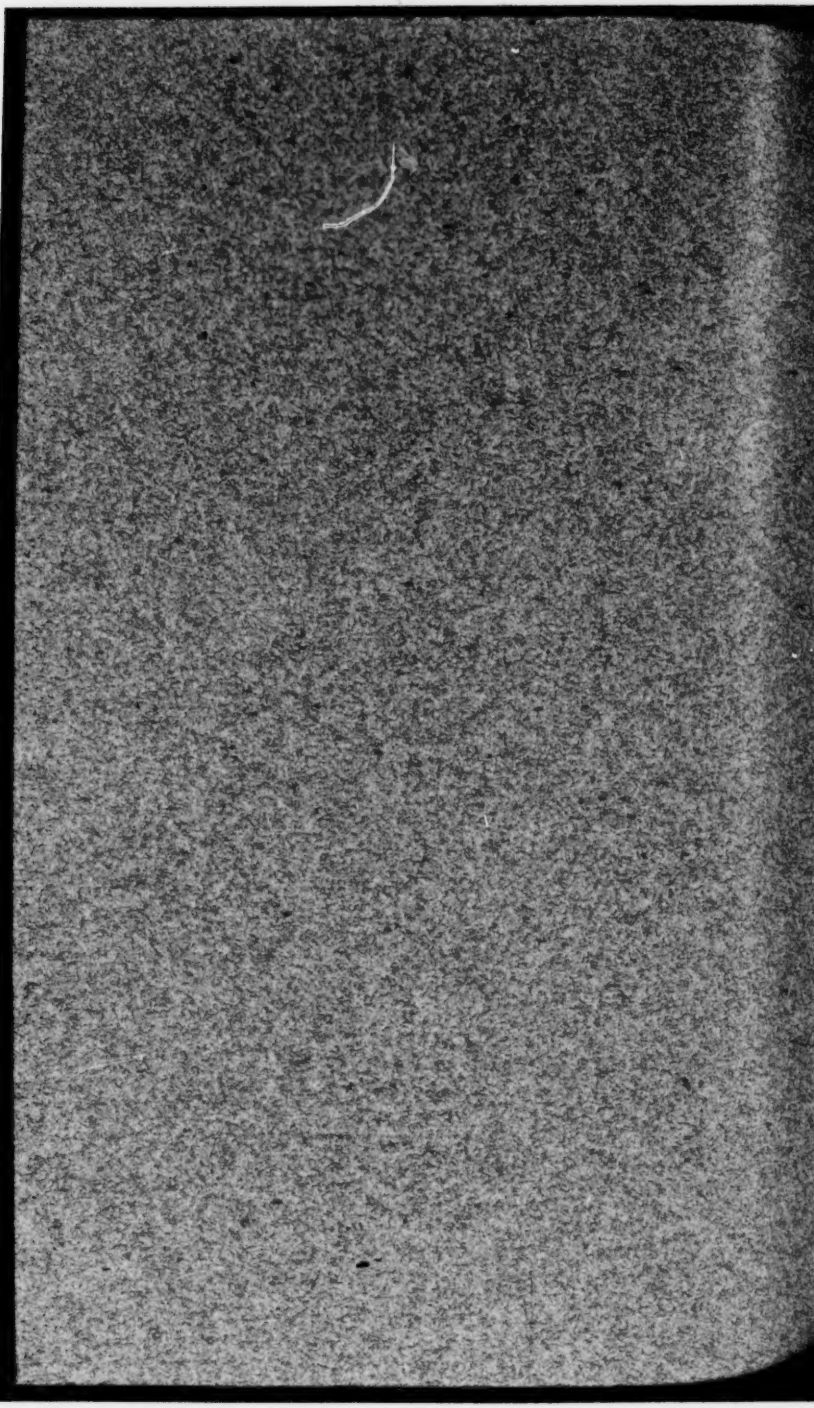
vs.

THOMAS G. LANSDEN.

BRIEF OF PLAINTIFFS IN ERROR.

W. D. DAVIDGE,
R. ROSS PERRY,
Attorneys for Plaintiffs in Error.

LAW REPORTER PRINT



IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

No. 282.

THE WASHINGTON GAS LIGHT COMPANY, CHARLES B. BAILEY AND JOHN LEETCH, PLAINTIFFS IN ERROR.

vs.

THOMAS G. LANSDEN.

STATEMENT.

This is an action for libel against the Washington Gas Light Company, John R. McLean, its president, Charles B. Bailey, its secretary, William B. Orme, its assistant secretary, and John Leetch, its superintendent.

The declaration charges that the defendants did "compose and publish and cause and procure to be composed and published" a certain libel set out at record pages 3, 4, 5 and 6. Plea of all the defendants not guilty and issue joined upon the plea (R. 7).

The verdict was for the plaintiff against the company, Bailey and Leetch (R. 8). There was no finding as to the other defendants.

Lansden, the plaintiff, was in the employ of the defendant company, as superintendent, from the 1st of November, 1886, until the 1st of June, 1893. He was a gas engineer; that is, as he defines the term (R. 23); a man who constructs and

manufactures gas works, and manufactures gas, and had been engaged in that profession for about thirty years. Before he was employed by the defendant company he was superintendent of the St. Louis Gas Works for eleven years. He belonged to the gas association, and was an expert in respect of the gas industry.

In January, 1893, action having been taken by the House of Representatives towards reducing the price of gas supplied by the company to the Government buildings in the District of Columbia to seventy-five cents per one thousand feet, the plaintiff was called on by John R. McLean, the president of the company, to make a written statement of what he could testify to, if called as a witness before the committee of the House.

Thereupon the plaintiff prepared, in his own handwriting, and delivered to McLean the following statement (R. 24, 36, 37):

> Name: ——— ———.
>
> Occupation: ———.
>
> How long have you been connected with the Washington Gas L't Co.?
>
> Six and a half years.
>
> Have you had other experience with gas Co.'s before coming to Washington?
>
> For the ten years previous to coming to Washington I was eng'r & sup't of the St. Louis Gas Co., and for the twelve years previous to that I was building and running gas works throughout the West.
>
> Are you familiar with the prices and quality of gas furnished by the leading cities of this country?
>
> I am. I have visited the works of every city of size throughout the United States.
>
> How do the works and methods of manufacturing gas at the Washington Gas L't Co. compare with works and methods of other cities?
>
> They are equal to any and superior to many of those of other cities.
>
> How do the prices charged by the Washington

Gas L't Co. compare with prices charged by the companies of other cities?

They are as low as any city where material for making gas is of like cost. Some of the cities get material for less than one-half the cost it is to our company.

Name some of the cities so favored.

Cincinnati and Cleveland, Ohio.

What city or cities furnish the highest C. P.?

New York city, I think, furnishes about as good gas as is made in this country.

How will the gas supplied by your company compare with New York?

I think we make as good gas as is made in any city. The methods of testing in Washington are different to other cities.

What is the price charged for gas by the leading cities of this country?

New York charges	125
Philadelphia	150
Baltimore	125
Chicago	125
St. Louis	125
Boston	125
Washington	125

What is the material used for making gas in Washington?

Coal and naptha oil.

What is the material used in other cities?

New York, principally oil; some coal.

Philadelphia, oil & coal.

Baltimore, oil; Chicago, oil; St. Louis, coal and oil; Boston, oil mostly.

Has there been much complaint of your gas at your office recently?

There has been complaint within the past few weeks during the cold weather of about one-half per cent. of our consumers. What they generally call bad gas is a want of pressure occasioned by the excessive cold weather.

What effect does the cold weather have on the gas?

All illuminating gas, by whatever *known method* made, contains an aqueous vapor. When the pipes are exposed by crossing areas or otherwise, this vapor forms a fine frost on the inside of the pipes, which checks the flow of gas. A great many of our meters are exposed, as we have no inspection in Washington. The gas-fitters usually set the meters where they please.

All other cities have inspection of gas-fitting?

Washington is the only city where gas is used that has no inspection.

Do you receive daily notice of the quality of your gas from the United States inspector?

Yes.

Do these reports show you are complying with the law?

They show we are doing much better than the law requires. They sometimes show four-candle power over the standard, and for the past two or three years the average has been over two candles above the requirement.

Do you make any difference in the quality of the gas furnished during the session of Congress to that furnished when Congress is not in session?

We never have, but this winter, since Nov. 1st, our new management instructed me to make the best gas I could. We have, since Nov. 1st, when our new plant was put in action, made a better candle power than before, but this is purely a business matter for competing with electricity; we will not reduce the candle power when Congress adjourns.

Was there not complaint of your gas before Congress met this winter?

About the 1st of Nov., when we started our new plant at 26th & G Sts., N. W., we had, for a few days, some trouble. As the process was new, it took our men a few days to learn how to handle it, yet at no time did we go below the standard.

What does gas cost to manufacture at your works?

It costs us 48.38 per thousand in the holder and
40.09 " " for distribution.

Can you in any way reduce the cost of gas in the manufacturing so your company could sell for less to the consumer?

I know of but one way that a small amount might be saved. That is by reducing the salaries of our clerks and the price paid to our laborers; this we would not like to do.

How does the prices charged for lamps in Washington compare with other cities?

They are as low as any where the same amount of gas is used to the lamp and the same number of hours lighted in the year, when the company lights and cleans the lamps.

This statement was by McLean delivered to the defendant Bailey, the secretary of the company, for safe keeping (R. 42, 37).

The plaintiff was never called as a witness in 1893, nor does it appear that in that year any investigation took place before any committee touching the proposed reduction.

On the 1st day of June, 1893, the plaintiff left the employment of the company, and his duties as superintendent devolved on the defendant, John Leetch. The parting of the plaintiff was, to say the least, not a happy one, and several witnesses testify that the plaintiff, at the time of his resignation promised to meet the company "on the Hill" (meaning at the Capitol) the next winter, and then to work in the interest of the consumers, instead of the company (R. 59, 60, 61, 62). When the next winter came and in January, 1894, an investigation was set on foot in Congress in respect of the reduction of the price of gas to one dollar, instead of one dollar and twenty-five cents per thousand feet, the existing price.

The plaintiff, true to his word, appeared as a witness, and testified as follows:

Lansden in 1894.

Q. From your knowledge of the business and condition of affairs here, at what price could the gas company sell gas and pay a reasonable profit?

A. Well, sir, I think they can sell it at $1 a thou-

sand. That is the reason I came before this committee. I am a gas consumer to-day, and I have had a good deal of experience, and I think it to the interest of the gas company to stop all these troubles, and they should put the price down to $1 a thousand and stop the annoyance. They should make good gas and put the price down to $1.

Q. Will it stop the complaints?

A. Not entirely. You never will do that.

Q. What is the result of your experience, if you are able to submit a statement to the committee—leaving out of consideration the interest on investment and plant, etc., what is the actual cost per thousand for the production of gas in the city of Washington?

A. Do you mean what it can be made for?

Q. What did you make it for under your management?

A. Without counting interest, you mean?

Q. Without counting the interest on investment.

A. It can be put in the holder with the present modern machinery which the company has for about 32 cents, with the proportion they are making now of water gas and coal gas. I think it ought to be distributed for 20 to 22 cents a thousand.

Q. What is the next item of cost after putting it in the holder?

A. Distribution. After it is put in the holder it is drawn out by the consumer; and then there is the expense of inspectors taking the statements and running what we call the upper offices.

Q. What percentage of cost would that be?

A. I put that between 20 and 22 cents.

Q. That would make this cost 54 to 56 cents per thousand?

A. Yes, sir; I think so.

Q. That includes office expenses?

A. Then comes taxes and repairs, and I think it can be easily made inside of 70 cents, counting in repairs and taxes.

Q. Now, does that include everything except interest on investment?

A. Interest on investment comes in the shape of dividends, I consider.

By a comparison of this evidence of the witness with his written statement delivered to McLean and above set out, the most glaring discrepancies will be apparent.

The cost of manufacture, by which is meant the expense necessary to manufacture and put the manufactured fluid in the large gas-holders, is reduced 18.38 cents per thousand, and the cost of distribution—that is, the expense of whatsoever kind incurred down to the delivery of the manufactured article to the consumer—is reduced from 40.09 to from 20 to 22 cents per thousand, and the total of both the cost of manufacture and that of distribution is reduced about 18½ cents per thousand feet.

The gas industry is a very large and important one, and the evidence of the plaintiff, published in the daily papers as it was, produced widespread astonishment and criticism among gas producers.

On the 12th day of February, 1894, E. C. Brown, the publisher and editor of a newspaper published in New York, and devoted especially to the gas industry, wrote the following letter to the defendant Leech (R. 10):

E. C. Brown, publisher. Established 1883.
Office of Progressive Age. Gas, electricity, water.

NEW YORK, *February 12, 1894.*

Washington Gas Light Co., Washington, D. C.

GENTLEMEN: I have watched with great interest the continued reports of the proceedings against your company, as published in the local newspapers of your city, and I have been somewhat surprised at the character and extent of Mr. Lansden's testimony. Was his statements correctly reported in the Washington Star of 3rd inst.? Newspapers all over the country are taking up his figures and using them to suit their own ends against home companies. Any information you would care to give us concerning the object of Mr. Lansden's attack will be considered confidential as to source of information.

Very truly yours,

E. C. BROWN.

The envelope containing the letter was as follows:

"The Progressive Age. Gas, electricity, water. $3.00 per year. 280 Broadway, New York. Semi-monthly.
New York, N. Y., JOHN LEETCH, *Gen'l Manager.*
Feb. 14, 5.30 p. m., 1894. *Washington Gas Light Co. Washington, D. C.*
Personal."

This letter was shown by Leetch to the defendant Bailey, who had the custody of the written statement of the plaintiff above mentioned, and who called the attention of Leetch to that statement and, at the instance of the latter, gave it to him, and he went off with it to his room (R. 42).

On the same day, the 13th of February, 1894, Leetch answered Brown's letter as follows:

WASHINGTON, D. C., *Feb.* 13, 1894.

E. C. Brown, Esq., publisher Progressive Age, 280 Broadway, N. Y.

DEAR SIR: I have just now received yours of the 12th instant, relative to the statement made by Mr. T. G. Lansden, former sup't of the Washington Gas Light Company, before the investigating committee of Congress to reduce the price of gas in this city.

As Mr. Lansden is no longer in the employ of the gas company, the motive was generally understood that prompted his statement.

As the newspapers in Washington gave a correct version of his statement, there is no doubt he said that gas could be furnished at the meter for seventy cents, and to the consumer for $1.00 per 1,000 cubic feet. This price at the meter was exclusive of repairs, services, etc.

Under a former resolution of Congress, bearing date of February, 1893, Mr. Lansden was called upon to answer certain questions bearing upon the reduction of price of gas in Washington and made the following replies:

"Q. What does gas cost to manufacture at your works?

A. It costs us 48.38c per thousand in the holder and 40.09c. per thousand for distribution.

Q. Can you in any way reduce the cost of gas in the manufacturing, so your company could sell for less to the consumer?

A. I know of but one way that a small amount could be saved—that is, by reducing the salaries of our clerks and the price paid to our laborers. This we would not like to do.

Q. How do the prices charged for lamps in Washington compare with other cities?

A. They are as low as anywhere the same amount of gas is burned to the lamp and the same number of hours lighted in the year, and when the company lights and cleans the lamps."

You will notice that he makes a difference of about 18½ cents per 1,000 feet then as compared with his statement now, although he must know that the material used, coal, and labor is just the same now as then, except price of naptha, which is higher.

You can try to reconcile the two statements.

Very truly yours,

JOHN LEETCH,

General Manager.

The questions and answers contained in this letter are a literal copy of those in the written statement of the plaintiff.

On the 14th and again on the 19th of February, 1894, Brown wrote to Leetch requesting a copy of the evidence of the plaintiff given at the investigation then pending, and intimating an intention to publish the statements of the plaintiff on that as well as the former occasion.

A copy of the evidence of the plaintiff was accordingly sent on the 20th of February, 1894 (R. 49, 50).

On the 1st of March, 1894, the alleged libel, set out in the declaration, was published in the Progressive Age (R. 14, 15, 16 and 17).

On examination of this paper it will be found that so much of the letter of Leetch of the 13th of February, 1894, as asserts that the plaintiff was "called upon" in February,

1893, to answer certain questions bearing upon the reduction of gas, with the questions and answers on that occasion, is reproduced. (See Record, last line of pages 15 and 16 down to "Lansden in 1894.") The contents of the letter thus reproduced by Brown are the only evidence connecting the defendants in any manner with the libel as alleged in the declaration, and by the ruling of the court below are made the basis of their responsibility.

Even conceding, however, that the contents of the letter were a libel they certainly were not the libel set out in the declaration. The libel declared on is another and wholly different paper in words, substance and effect. It is besides set out "as of the tenor following" (R. 3) and in inverted commas, or in other words descriptively, and the plaintiff could only recover by proving exactly the paper described.

The court ruled otherwise, under the demurrer to the plaintiff's evidence (R. 36) and in response to the prayers of the defendants (R. 66, 67) and the ruling was excepted to (Id.) and is here assigned as error.

The declaration charges that the defendants composed and published and caused and procured to be composed and published the alleged libel.

In the absence of any evidence of the first part of the charge the only issue before the jury was whether the defendants or any of them caused or procured to be composed and published the alleged libel.

This plain and simple issue is the very thing not submitted to the jury, but in lieu of it the court ruled (R. 64, 65) that if Leetch at the time of writing and sending the letter knew that Brown was the publisher of the Progressive Age, and that said paper was devoted to the interests of and had an extensive circulation among gas manufacturers, then it was for the jury to determine whether the letter was written and sent for *the purpose of supplying the data* it contains for *a* publication in the Progressive Age or

with the *knowledge* that it was *likely* to be or *probably* would be used for such purpose.

The ruling then proceeds further to declare that if the purpose of Leetch was to supply data for a publication (not *the* publication) *or* if he knew that the letter would be "likely" to be used or "probably" would be used for *a* publication (not *the* publication), then if sent maliciously, for such purpose or with such knowledge, responsibility would, by operation of law, attach not only for the publication by Brown of the contents of the letter, but for all other portions of the alleged libel either "suggested" or "inspired" by the letter.

This ruling, given at the instance of the counsel of the plaintiff, was supplemented by the court declaring, of its own motion (R. 66), that in sending the letter it was not necessary that Leetch should have acted from hatred or ill-will—in other words from malice in fact—but that malice in law would suffice, and that such malice could be inferred from sending—

> "any false or libellous matter about the plaintiff to said Brown, knowing it to be false, with the *intent* or *consent* that the same should be published."

The record shows that when the letter was sent by Leetch he neither knew nor had reason to know that the statement on file, in the handwiting of the plaintiff, was not in fact what on its face it purported to be.

Thus the ruling of the court was, in substance, that the sending of the letter with the alleged purpose, or, if not with such purpose, with the alleged knowledge, in law made the sender liable for having caused to be composed and published so much of the alleged libel as was "suggested or inspired" by the letter.

This ruling utterly ignored any *request* on the part of the sender to compose and publish or any *intent* on his part that the contents should be composed and published, and

in short the relation of the sender to the alleged libel as the *proximate* cause of its publication. It broadly assumed that sending the so-called data of itself made the sender responsible for whatever the data might suggest to or inspire in Brown, and for whatever the latter, acting as a free agent and of his own independent volition, might compose and publish.

It also ignored the great fact that the so-called data were true, or, if not true, that Leetch had every reason to believe them to be true, written as they were by the plaintiff himself.

This ruling the defendants sought by a series of prayers to correct or modify, but without success (in prayers 7, 8 and 9, and exceptions, R. 67).

The above ruling was made in respect of the defendants Leetch and the company, but was reiterated with even more injustice in respect of the defendant Bailey (R. 65, plaintiff's second prayer). As stated above, Bailey gave the written statement of the plaintiff to Leetch. The plaintiff claimed that the cost of manufacture and distribution, represented by the figures in the statement, was taken by Bailey from the books of the company and given to him, and, without any evidence, was known to Bailey not to be the estimate of the plaintiff. The court ruled that if Bailey so knew and communicated the figures to Leetch as the estimate of the plaintiff, and intended them to be communicated to Brown for publication, then the jury might find that Bailey, as well as Leetch and the company, caused and procured to be composed and published the alleged libel. This ruling, apart from the absence of evidence to sustain it, is obnoxious to the same objections as the previous ruling.

Both rulings are assigned as error.

At the trial the court admitted, against the repeated objections of the defendants, evidence as to the financial condition of the company, its earning capacity, its dividends of ten per cent. per annum from 1890 to the time of the trial and large extra dividends in cash and certificates. All the

evidence in the case is certified by the bill of exceptions (R. 64). The attention of the court is specially asked to the rulings and colloquies (R. 34, 35, 36). The sufficiency of the company to pay the full amount of damages claimed, $50,000, was admitted by its counsel. But, said the court:

> "I do not think that the admission of a fact that it is able to respond to damages amounts to anything. The object of this evidence is, as Mr. Darlington says, to furnish the jury the basis upon which they may calculate exemplary damages, if they are entitled to exemplary damages as is claimed. If the jury are going to give exemplary damages they might give much larger damages against a very wealthy person than they would against a person of ordinary circumstances."

And again—

> "If you admit that if they are entitled to a verdict at all they are entitled to $50,000, that does away with the necessity of the evidence; otherwise I think it would be admissible."

This evidence was given at the close of the plaintiff's case. The court will see by an examination of all the evidence that there was not the slightest ground for exemplary damages. Indeed, they were not subsequently claimed by the plaintiff (R. 66). And the court ruled that compensation was the measure of damages (R. 69, 76).

The effect of the introduction of this evidence must have been to prejudice the jury and inflame their minds against the corporation, and that it influenced them is shown by the amount of the verdict.

The court never expressly withdrew the evidence, even if that remedy would have sufficed to correct the mischief done by its improper admission. Giving the instruction as to compensatory damages and that too, with the qualification that the plaintiff did not "contend for" or "claim" more was wholly insufficient (R. 76).

This also is assigned as error.

The demurrer to the evidence of the plaintiff (R. 36) and the tenth prayer of the defendants refused by the court (R. 69), presented the question of the privileged character of the letter of the 13th of February, 1894 (R. 12, 13). This letter also is the foundation of the first and second instructions given at the instance of the plaintiff and in which the above question is entirely overlooked by the court (R. 65, 66).

The letter was not volunteered, if indeed that could make any difference, but was an honest answer to the letter of Brown, above set out, dated the day before, seeking information on a subject in which he had an interest. The evidence of the plaintiff before the committee concerned all interested in the production of gas here and elsewhere, and his standing and experience gave more than ordinary weight to his evidence. It was of vital importance to all gas producers and the newspaper devoted to their interests to know whether the plaintiff had testified, as reported, that gas could be delivered to the consumer for twenty-five cents per thousand feet less than the current rate in the different cities of the country, and if so, whether his evidence was worthy of belief or the outcome of prejudice and spite.

The letter was therefore a privileged communication if written in good faith, and good faith was to be presumed unless express malice was shown.

The uncontradicted evidence is that Leetch when he wrote the letter, believed that the statement on file in the handwriting of the plaintiff, contained his estimate in 1893 of the cost of manufacture and that of distribution (R. 53). For what Leetch wrote he had the written warrant of the plaintiff himself (R. 53, 54), and (R. 28) the further statement of plaintiff that he knew of but one way the cost could be reduced and that was by reducing salaries and wages. He had also the warrant of what he was told by Bailey (R. 42).

The plaintiff, in his evidence (R. 23), attempted to weaken the force of his written statement by asserting that the figures as to the cost of manufacture and that of distribution were not his own, but were given by McLean to him, and by him written in the statement. McLean contradicts this (R. 36).

The plaintiff admits he could closely approximate the cost of manufacture, being in charge of that department, but utterly fails to explain the wide difference in respect of manufacture between the statement and his evidence in 1894, and, as regards distribution, it is inconceivable that with his knowledge and long experience he could not closely approximate that also. He knew as to both as much in 1893 as in 1894.

He also wholly fails to explain other passages in the statement utterly at war with his evidence in 1894.

But it is unnecessary to show more fully the impotence of this and other devices to get rid of the statement.

The answer to whatever is set up to avoid the statement *is that Leetch is to be judged by what was presented to his mind when he wrote the letter, and not by what the plaintiff asserted in his own behalf more than two years afterwards.*

The question to be tried was not whether the statements in the letter were true, but whether the writer believed them to be true. Even if it be assumed, contrary to the evidence, that McLean or Bailey knew the estimates in the written statements were not those of the plaintiff, there can be no pretense that *either ever communicated that information to Leetch, the writer of the letter.*

The letter was *prima facie* privileged, and even if its contents were not true, that fact bore only upon the subject of defendant's malice.

The action of the court in respect of privileged communication is assigned as error.

Another ruling of the court assigned as error is the submission to the jury of the question whether Leetch, when he

wrote and sent the letter of the 13th of February, 1894, was acting within his authority, express or implied, or as it is very vaguely put by the court "in the course of his duties," as general manager. If he was so acting the court ruled the company was responsible not only for the letter but for whatever in the alleged libel was "suggested" or "inspired" by the letter.

There was no evidence in the case that the letter of Brown dated the 12th of February, 1894, and addressed to the "Washington Gas Light Company, Washington, D. C., (R. 10), the envelope being directed to 'John Leetch, general manager, Washington Gas Light Company, Washington, D. C.'" (R. 51), was ever received by the company, or that any express authority was ever given to Leetch or anybody else to answer it or that the answer of Leetch was ever ratified or adopted by the company or even known to it.

Nothing of the sort is pretended, but the contention is that Leetch was acting in the exercise of his authority as general manager, and that writing and sending the letter was within such authority (R. 54, 55, 68). This brings us to the occasion of the letter. The company was engaged in a controversy before the committee involving the reduction by Congress of the price of gas. The plaintiff had, on February 3, 1894 (R. 10), been examined as a witness, and his evidence had been circulated by the newspapers. Then, on February 12, Brown wrote his letter expressing surprise at the character and extent of the plaintiff's evidence, and asking whether the evidence was correctly reported, and what was the object of the plaintiff's attack. Action upon such a letter relating exclusively to the evidence of the plaintiff before a Congressional committee, and his object in assailing the corporation, belonged to the Board charged with the government of the affairs of the corporation. Such action involved the exercise of discretionary power in a matter very exceptional in character. The subject of the letter was not the cost of gas, but *the evidence of*

the witness. The letter was addressed to the company, and there can be no pretense that the Board ever delegated to Leetch authority to answer it. There can also be no pretense that the authority to answer was incident to his office. His duties related to the manufacture of gas, the care of the gas works, and doing what he was directed to do. His duties were large, but purely subordinate and ministerial, and certainly did not embrace the charge of the Congressional investigation or the authority to determine whether any answer, or if any, what answer, to the letter was required by the interests of the company. He swears he regarded the letter as personal, and answered it as an act of courtesy.

In the following argument every particle of evidence bearing upon his authority is set out for the convenience of the court.

The last question presented by this appeal is the form of the verdict. The verdict is against three only of five defendants. The issue submitted to the jury involved all the defendants—five in number. As part only of the issue has been found by the jury the verdict was void, and the judgment on that verdict should be reversed.

ASSIGNMENT OF ERRORS.

The court erred:

1. In refusing to direct a verdict for the defendants on the ground that the evidence did not tend to show that they caused the publication of the libel described and set out in the declaration, but, at best, only so much of said libel as is contained in the letter of the 13th of February, 1894.

2. In ruling to the contrary, in respect of the company and Leetch, that the jury might find from the evidence that said letter was sent by Leetch to Brown with the purpose of furnishing to the latter data for *a* publication (not *the* publi-

cation) or with the knowledge that it was "likely" or "probable" the letter would be used for *a* publication (not *the* publication), and that if the letter was sent for such purpose or with such knowledge the said defendants were liable for *any* publication which Brown might make, or for any part of such publication, "suggested" or "inspired" by the letter; or, in other words, that the liability of said defendants did not depend upon their causing by request or otherwise the alleged libelous publication to be made, but that if they did not so cause they were still liable by reason of sending the data for any publication or *any part* thereof which Brown, an independent agent, might make if "suggested" or "inspired" by the letter.

3. In further ruling that the above facts which would make the company and Leetch liable would also make Bailey liable for the alleged libelous publication, or any part thereof, suggested or inspired by the letter, if, when shown by Leetch the letter of Brown of February 12, 1894, he, Bailey, knowing that the figures in Lansden's statement as to the cost of the manufacture and distribution of gas did not represent Lansden's own estimate, but were taken from the books of the company, delivered said statement to Leetch for the purpose of enabling him to communicate it to Brown as Lansden's own statement and as tending to impeach his evidence in 1894.

4. In overruling the objection that there was a variance between the libel alleged and described in the declaration and the evidence.

5. In not submitting to the jury the question whether the defendants caused or procured.

6. In submitting to the jury the question of the responsibility of the defendant, Bailey, without any evidence to support such responsibility.

7. In holding that responsibility attached to the defendants for what the jury might find was "suggested" or "inspired" by the letter of the 13th of February, 1894.

8. In admitting illegal evidence as to the financial condition of one of the defendants and failing to withdraw and caution the jury against the same.

9. In ignoring the question of privileged communication.

10. In submitting to the jury the question whether Leetch, in respect to the subject of the letter of the 13th of February, 1894, had authority to bind the company.

11. In refusing to direct a verdict in favor of each of the defendants.

12. In rendering judgment on the verdict which disposed only in part of the issue submitted to the jury.

13. For divers other errors apparent on the face of the record.

POINTS AND ARGUMENT.

1st, 2d, 3d, 5th and 11th Errors Assigned.

1. The declaration charges that the defendants did "compose and publish and cause and procure to be composed and published" the libel described and set out according to its "tenor" (R. 2, 3, 4, 5, 6). To enable the plaintiff to recover it was necessary for him to maintain this allegation. It is not controverted by the plaintiff that the alleged libel was in fact composed and published by Brown, the editor of the Progressive Age, a newspaper published in the city of New York. His contention, however, is that the defendants, or some of them, caused or procured the publication of the libel, and hence are liable.

On behalf of the defendants it is conceded that one may be liable for the publication of a libel when composed by another, and further that every one who requests or procures, by words or acts, another to publish is answerable as though he had published himself. Such liability, however, is for the specific libel published and not for any other libel.

Thus the question in the present case is whether the plaintiffs in error caused or procured the publication of the libel described in the declaration.

This would seem to be a very simple question, but simple as it is it has never been tried; on the contrary, other and essentially different issues have been, by the erroneous rulings of the court, substituted in its stead.

At the trial it was claimed that the defendant company was liable for the libel because its agent, Leetch, acting in the line of his duty, wrote and sent to Brown the letter of the 13th of February, 1894, in reply to his letter of the 12th of the same month (R. 10, 12).

It was also claimed that Leetch was individually liable by reason of the same letter.

And it was further claimed that Bailey was liable, because, knowing that the estimate of the cost of distribution in Lansden's statement was taken by him from the books of the company, he gave the statement to Leetch as containing the estimate of Lansden himself and thereby enabled Leetch to send it in his letter to Brown as such estimate.

Thus the letter of the 13th of February, 1894, was the sole predicate of liability. Leetch was liable because he wrote and sent it, the company because it was responsible for what Leetch did, and Bailey because he gave the estimate to Leetch as that of Lansden, knowing to the contrary, and thereby aiding in the transmission of that part of the statement to Brown, although the evidence shows that Bailey did not even know what use Leetch proposed to make of the statement.

It is not pretended that the defendants below or any one of them knew or had seen or heard of Brown until the receipt of his letter by Leetch, or knew or had reason to know what use, if any, he could make of the contents of the letter. Knowing, then, the only pretense of authority or agency of Brown to act in behalf of the defendants below in composing and publishing the alleged libel, there surely ought

to be little difficulty in determining whether such authority or agency in fact existed and if it did to what extent.

It is submitted that in order to render any of the defendants below liable for causing or procuring the composition or publication of the alleged libel it was in law incumbent upon the plaintiff to prove that they did in fact cause or procure as charged. The libel in question was, it is conceded, composed and published by Brown. If, however, in what he did he acted at the request directly or indirectly of the defendants, or by their authority, they also are liable. But the basis of their liability is that Brown was their agent, and, more than that, their agent in respect of the specific act charged. And where it is sought to charge any party for the act of another, agency or authority on the part of the former in respect of the specific act complained of must be as clearly shown as is required when it is sought to make a party liable for his own act instead of that of another. There would be little security for the rights of person or property if this were not so. Indeed, the foundation of liability is that the evil intention of a wrongdoer finds expression through the act of another instead of his own act. And hence he is properly held responsible. We cite a single illustration, Parkes *vs.* Prescott, L. R. 4 Exch. 169, cited with approval in the opinion of the learned court below, and which, if followed, must have led to a conclusion diametrically opposite to that reached by the court.

In that case the alleged libel consisted of a report of the proceedings of a meeting of the board of guardians of the poor. One of the defendants (Prescott) was chairman of the meeting and another (Ellis) a member of the board. Discussion took place at the meeting in relation to the treatment by the plaintiff of his daughter, who, dependent upon public charity, was an inmate of the workhouse. The conduct of the plaintiff was denounced in highly defamatory remarks. Reporters were present and a report of the proceedings was published. At the trial evidence

was given to connect the defendants with the publication. The defendant Ellis said he hoped the local press would take notice of this very scandalous case, and requested the chairman to give an outline of it. This was done by several members of the board and the chief facts taken down by the reporters and afterwards published. The defendant Prescott also said in the course of his statement relative to the case, "I am glad gentlemen of the press are in the room, and I hope they will take notice of it." On which Ellis said, "And so do I." The defendant Prescott also said that he hoped publicity would be given to the latter. It was proved by the reporters that the reports published were a *correct summary* of what took place. The judge who tried the cause held the evidence of publication insufficient and directed a verdict for the defendants. The case then went to the Exchequer Chamber. A majority of the court, which consisted of five, held that to render the defendants liable there must have been evidence—

> "first, of a request to publish the proceedings of the meeting relating to the plaintiff's conduct, and secondly, that the report contained a *correct account* of the proceedings as the defendants meant it should appear" (p. 177),

and being of the opinion that there was such evidence, reversed the ruling below. The minority went further, in respect of the second point, Byles, J., holding that the request to publish, conceded to be necessary, must have been a request to publish the very words of the libel alleged in the declaration, and Miller, J.—

> "that to support the allegation that the defendants caused to be printed and published the libel set out in the declaration there ought to have been evidence of a communication, either verbal or written, of the entire substance of the libel to the reporter as the libel to be published, or that before or after the publication thereof the defendants saw and approved of the particular libel" (p. 186).

There was no difference of opinion as to the necessity of a request to publish, nor was it intimated that a hope or wish, if not effectuated by a request, would make the actual publisher the agent as to the specific act of the party charged. The majority held in terms that although the published libel need not be in the exact words of the request, it must adhere to it in "sense and substance"—as in a civil suit the principal is not bound beyond the authority given to his agent.

Turning now to the present case, it was necessary for the plaintiff to prove, first, a request to publish, and second, to publish, if not in the very words, at least, in "sense and substance" the alleged libel. These postulates of the right to recover were utterly disregarded by the court below, both as to the right to recover against Leetch and tne company (plaintiff's first prayer, R. 64, 72) and also as to Bailey (plaintiff's second prayer, R. 65, 73).

As to Leetch and the Company.

The court ruled that if Leetch wrote and sent the letter of the 13th of February to Brown and at that time was the general manager of the company, and in the course of his duties as such, wrote and sent the letter, and if at that time Brown was, and was known to Leetch to be, the publisher of the "Progressive Age," a paper devoted to the interests of gas manufacturers throughout the country and having an extensive circulation among them, then "it was for the jury to determine from all the facts and circumstances as disclosed by the evidence" (there were none except the letter itself), whether the said letter was written and sent *for the purpose of supplying data which it contained for a* (that is *any*) publication in the Progressive Age, or with the knowledge that it was "likely" to be or "probably" would be used for such purpose, and if the jury believe that the letter was sent maliciously *for such purpose* or *with such knowledge* and that the alleged libel was afterwards published in the Pro-

gressive Age, then to the extent to which the jury shall find the contents of the libel were "suggested" or "inspired" by the letter, the defendants are responsible for the publication of the libel.

It is submitted that this instruction is in every essential erroneous

1. *The charge was causing or procuring.*

The fundamental question was whether the defendants caused or procured—a very simple question to be tried by the jury if there had been evidence to sustain it. And yet this question was not even submitted to the jury. Instead of submitting it, the jury were instructed that if Leetch wrote and sent the letter for the purpose of supplying data for any publication, whatever its character, or with the knowledge that the letter was "likely" to be or "probably" would be used for such purpose, the defendants were liable for any "suggestion" or "inspiration" of the letter.

Thus, causing or procuring, ceased to be a fact triable by the jury, but was made an inference of law from writing and sending the letter for the purpose of supplying data for any publication or with the knowledge that it was "likely" or "probable" that Brown would use the contents for any publication; in lieu of the fact that lay at the foundation of the right of the plaintiff to recover, that is, causing or procuring, the defendants were made liable for a "purpose" or knowledge of what it was "likely" or "probable" Brown would do, although in fact they did not cause or procure the publication. The instruction utterly ignored the patent fact that a man may supply data, or have the knowledge, mentioned in the instruction and yet leave the question whether there shall be any publication or if any what, to the uncontrolled will and discretion of the other party.

The issue was whether the defendants were liable for the act of Brown. They could only be liable if Brown acted at their request, manifested by words or conduct, or in other words as their agent, and then only to the extent of the

agency. Was there any such request? The instruction assumes there was none and yet in its absence declares the plaintiff may recover. Such absence can only be accounted for by the fact that there was no evidence of a request and hence the plaintiff sought and was allowed to recover on other grounds.

The only defendant who held any communication with Brown of any sort was Leetch and he only by letter. If there was any request it must be sought in the correspondence set out in the Record (R. 10, 12, 49, 50.) It is too plain for argument that in none of the letters of Leetch does he request any publication. On the contrary he leaves Brown to act on his own judgment and responsibility. The utmost that can be said is that Leetch knew from the letters of Brown of February 14, 1894, and February 19, 1894, that the latter intended to publish the contradictory statements of Lansden, but that knowledge surely did not render Leetch and the company liable for any publication Brown might in the exercise of his own will and discretion subsequently compose and publish.

Even if there had been evidence that tended in any degree to show request, it was a fatal error to withdraw that question from the jury by substituting in lieu of it predicates of liability not its equivalent in law, logic, or common sense.

2. *The instruction having erroneously declared a process whereby a party might by operation of law cause and procure, although he did not in fact do so, then proceeds to commit an even greater error in respect of the thing caused or procured.*

The defendants were charged with causing or procuring a specific libel set out in the declaration according to its tenor (R. 3, 4, 5, 6). They were not charged with composing or publishing the letter of the 13th of February, 1894. The instruction declares that if the letter was written and sent to Brown to supply data for a publication, that is, any publication, or with knowledge that it was "likely" or

"probable" the contents would be used for any publication, the defendants were liable for the libel declared on to the extent to which its contents were suggested or inspired by the letter.

It is not easy to conceive a more dangerous doctrine than that announced by the instruction, and it is submitted that the law is exactly the reverse.

The charge is that the defendants caused and procured the libel declared on. The proof is that they wrote and sent the letter. The libel was composed and published by Brown. Then did the letter cause and procure such libel? Was Brown by the letter made the agent of the defendant for the publication of the libel declared on? Assume the letter to be libelous, yet the defendants were not sued for the libel contained in it. Are they liable for another and in form and substance a different libel? Certainly they are not, unless by the letter they authorized or requested Brown to publish such other and different libel. The real question is one of agency or authority.

It is true that in respect of crimes committed by an agent the principal may be responsible although the agent has departed from the authority given. But this is on grounds of public policy and in civil cases the rule is different and it is always competent to show that the authority given was not pursued, and hence the principal not liable In Parkes *vs.* Prescott, *supra*, there was no difference of opinion on this point. Montague, J., speaking for the majority, said as stated above and also (p. 174):

> "The man who requests another to make and publish an outline or summary of a speech, writing or proceedings must know that the words will be, to some extent, those of him who makes such summary or outline; and he must therefore be taken to constitute him an agent for the purpose and be answerable for the result, *subject always to the question whether the authority has been really followed.*"

And Byles, J., page 170:

> "There is a great distinction between the authority which will make a man liable criminally and the authority which will make him liable civilly. A principal is not civilly liable for the acts of his agent unless the agent's authority be by the agent duly pursued, but the principal may be criminally liable though the agent may have deviated very widely from his authority or instructions. . . . It is true that a libel is a criminal act, but in this case the plaintiff does not proceed for the criminal act, but for the civil injury. . . . Besides, in misdemeanors, although all who procure, abet, assist or assent to, are principal misdemeanants, yet the judge may apportion and restrain the punishment to the real demerits of each delinquent. But in a civil action the object is damages, which cannot be apportioned among the defendants, but all who remain upon the record must be liable for the whole amount. . . ."

In the above case the libel consisted of a summary or condensed statement of the proceedings at the meeting, and witnesses testified to the correctness of the summary "in sense and substance."

Here the alleged libel is not only different in words, but quite as different in sense and substance. A new subject—that is, Lansden's St. Louis exploit—is introduced and treated so as to induce the belief that it was a disgraceful act of some sort and the subject of the letter; that is, the contradictory statements of Lansden in 1893 and 1894 is discussed in abusive and libelous expressions, in sense and substance different from anything contained in the letter.

It is true the questions and answers of Lansden contained in the letter written by himself in 1893 are republished and constitute part of the alleged libel, but they are a part only and there is no request to publish even them as already shown, but as to the residue of the alleged libel no candid

mind will assert that it is other than a publication made by Brown of his own motion for which he and he alone is responsible. This fact probably led to the novel doctrine of "suggestion" and "inspiration" contained in the prayer.

Identical in facts with the present case is that of Cochran *vs.* Butterfield, 18 N. H. 115.

This was an action in case for a libel alleged to have been published, or caused to be published, in a newspaper called "The Gleaner." The plaintiff produced at the trial the editor of "The Gleaner," who testified that the article in question was written by him from materials furnished by the defendant, some of which were furnished in a conversation and some furnished in a letter which the witness said he had received from the defendant. The witness pointed out in the article some of the materials which he said were so furnished him, but could not tell which were furnished in the letter.

The court (Gilchrist, J.) say (p. 117):

> "A libel is a written picture, or other sign, and is so distinguished from slander, which consists in words spoken.
>
> "But he who by words causes another to write or paint the thing conveying the libelous matter may be as guilty as if his own hand traced the lines.
>
> "It would, however, confound this distinction between the two offenses of verbal and written slander to charge him who speaks the words as the author of a libel which another, of his own motion, composes and publishes from the materials thus furnished.
>
> "This action is against defendant for publishing a libel in the 'Gleaner;' the evidence is that he communicated orally some of the materials that were woven into the production by the witness, and that a letter, supposed upon evidence presently to be considered, to have been written by the defendant, furnished other materials. The letter might itself have been a libel but a different one no doubt, from that complained of in the action."
>
> "Now this evidence comes entirely short of proving that the defendant published, or procured another

to publish, any libel whatever in 'The Gleaner.' It does not appear that he ever requested a libel to be composed out of the materials that he supplied, or that he expected, or had any cause of suspecting, that his communication would have been used for such a purpose.

"The case bears no resemblance to that of The King *vs.* Johnson, 7 East, 65, where the defendant not only had previously requested the insertion of a communication upon the subject of the alleged libel in Mr. Cobbet's paper, but in one of the communications recognized the preceding as having been published in that paper, and used expressions denoting that they had been sent for that purpose."

And see also—

Adams *vs.* Kelly, Ry. & Mood. 157.

Rex *vs.* Cooper, 8 Q. B. 533, reviewed in Parkes *vs.* Prescott.

The King *vs.* Johnson, 7 East. 65.

3. *Perhaps the most conspicuous error of the instruction is that in the absence of any request to publish the alleged libel the defendants were responsible for any part or parts "suggested" or "inspired" by the letter.*

According to the doctrine of the court a party who communicates to another a slander or libel is liable, not only for the repetition of it by the latter, but even for any new slander or libel that may be suggested or inspired by it.

Thus in the present case the defendants were held liable both for the republication of the libel contained in the letter and also for any new and different libel suggested or inspired by the letter.

This doctrine is wrong in respect of the republication of the libel communicated and *a fortiori* in respect of another libel suggested or inspired by the one communicated. A man is properly held answerable for what he says or writes or causes another to say or write, but there is no warrant in law or reason for holding him responsible for the action of

another who voluntarily chooses to repeat what has been said or written, or, more than that, to commit a new wrong upon the suggestion or inspiration of what has been said or written. The sublimated and nebulous doctrine of suggestion or inspiration figured very largely at the trial, though a matter of guess work and not supported by a particle of evidence.

See prayer of defendants modified (R. 67, 68), Charge (R. 72).

Brown, the publisher, testified as a witness (R. 10–14), but his evidence gives no color to the theory that the alleged libel was other than the emanation of his own mind.

The republication is not in law the natural and proximate consequence of the original slander or libel. This is settled by many decisions.

Townsend on Slander and Libel, Secs. 112, 117.
Ward *vs.* Weeks, 7 Bing. 211.
Tunnecliffe *vs.* Moss, 3 Car. & K. 83.
Barnett *vs.* Allen, 1 F. & F. 125.
Dixon *vs.* Smith, 5 H. & N. 450.
Parkes *vs.* Scott, 1 H. & C. 153.
Stevens *vs.* Hartwell, 11 Metc. 542.
Terwilligen *vs.* Ward, 17 N. Y. 54.
Gough *vs.* Goldsmith, 44 Wisc. 262.
Hastings *vs.* Stetson, 126 Mass. 323.
Shurtleff *vs.* Parker, 130 Mass. 130.

In Hastings *vs.* Stetson, *supra*, Gray, C. J., says:

> "It is too well settled to be now questioned that one who utters a slander is not responsible, either as a distinct cause of action, or by way of aggravation of damages of the original slander for its voluntary and unjustifiable repetition, without his authority or request, by others over whom he has no control, and that such repetition cannot be considered in law a necessary, natural, or probable consequence of the original slander."

As to Defendant Bailey.

6th Error Assigned.

The second instruction, given at the instance of the plaintiff (R. 65), relates to the responsibility of Bailey for causing or procuring the publication of the alleged libel, the first instruction relating to Leetch and the company. The second embodies all the errors of the first as the responsibility of Bailey is in terms made dependent upon the first—indeed could not be otherwise.

The predicate of the responsibility of Bailey is that he knew the figures as to cost, in the written statement of the plaintiff, were derived from the books of the company, and were not the estimates of the plaintiff, as they appeared to be in the statement, and that so knowing, he gave the statement to Leetch for the *purpose* of enabling him to communicate them to Brown for the *purpose* of publication.

These two "purposes" are utterly devoid of any support in the evidence.

As to Bailey's knowledge in respect of the figures, it is true that when the statement was prepared by the plaintiff, Bailey gave him what information he sought from the books of the company, but it is equally true that that information was given to a party entirely competent, from his own knowledge and experience, to judge of its correctness, and was adopted, and indeed has never been questioned.

But coming to the "purposes," the only evidence is that of Bailey himself (R. 40, 42). He swears that he gave the statement to Leetch and "did not know what he wanted with it," that "he did not give Leetch any data to reply to the letter; there was nothing thought about writing the letter at all," etc. It is perfectly clear from the evidence of Bailey that he knew nothing as to what Leetch was going to write, and as to the letter itself, he never saw it or had any knowledge of its contents before it was sent, nor afterwards until the alleged libel had been published.

As stated, Bailey was the only witness. It may be said the jury might not credit him. Conceding that, however, the case was left without any particle of evidence connecting Bailey in the remotest manner with the publication of the libel.

II

Variance in Form and Substance between the Declaration and Proof.

4th Error Assigned.

In the case at bar the libel complained of is set out in these words: "A certain false, scandalous, malicious, and defamatory libel of *the tenor* following, to wit."

By the use of this form of pleading the pleader has bound himself to set out *verbatim* the libel complained of, and must follow it up by showing *the act* of publication by these defendants of that *libel* and if there be a *variance* between the form of the libel alleged and the proof it is fatal.

In Wright *vs.* Clements, 3 B. and Ald. 503, Abbot, C. J., says:

> "In actions for libel, the law requires the very words of the libel to be set out in the declaration, in order that the court may judge whether they constitute a ground of action; and unless a plaintiff professes to set them out he does not comply with the rules of pleading.
>
> "The ordinary mode of doing this is to state that defendant published, of and concerning the plaintiff, the libellous matter, to the tenor and effect following. In that case the word 'tenor' governs the word 'effect,' and binds the party to set out the very words of the libel.
>
> "Holroyd, J.: The law attaches a technical meaning to the word 'tenor' as signifying either an exact copy or a statement of the libel verbatim. . . . Now, where a charge, either civil or criminal, is brought against a defendant, arising out of the publication of a written instrument, as is the case in for-

> gery and libel, the invariable rule is, that the instrument itself must be set out in the declaration or indictment, and the reason of that is that the defendant may have an opportunity, if he pleases, of admitting all the facts charged, and of having the judgment of the court whether the facts stated amount to a cause of action or a crime. . . . A defendant is not bound to put the question as a combined matter of law and fact to the jury, but has a right to it as a mere question of law to the court."

"Tenor" imports *identity*, and whenever that is destroyed, either by the omission or adoption of any one word, however slightly the sense may be affected, it will be regarded as a fatal variance.

Ruffin, J., in State *vs.* Townsend, 86 N. Car. 676.
State *vs.* Bonney, 34 Me. 383.
People *vs.* Warner, 5 Wend. 271.
Com. *vs.* Wright, 1 Cush. 65.
State *vs.* Johnson, 26 Iowa, 407.
Com. *vs.* Stevens, 1 Mass. 203.

Again: Any allegation which narrows and limits that which is essential, becomes *descriptive* and must be proved as alleged. Thus in contracts, *labels in writing* and written instruments in general, every part operates by way of description of the whole.

Greenleaf on Evidence, Secs. 58, 59, 60.
Newell on Defamation, 804.
Perry *vs.* Porter, 124 Mass. 339.
Crotty *vs.* Morrissey, 40 Ill. 477.
Chapin *vs.* White, 102 Mass. 139.
Gates *vs.* Bowker, 18 Vt. 23.
Strader *vs.* Snyder, 67 Ill. 404.
Parkes *vs.* Prescott, L. R. 4 Ex. 168.
Adams *vs.* Kelley, 21 E. C. L. 157.
Whiting *vs.* Smith, 13 Pick. 371.

III.

Wealth of Defendant Company.

8th Error Assigned.

The admission of illegal evidence as to the financial condition of the company, and the failure to withdraw and caution the jury.

Pennsylvania Co. *vs.* Roy, 102 U. S. 451.

In some States the admission of illegal evidence is not cured even by withdrawal.

Howe Machine Co. *vs.* Rosine, 77 Ill. 105.
Fire Ins. Co. *vs.* Rubin, 79 Ill. 402.
Erbin *vs.* Lorillard, 10 N. Y. 299.
Furst *vs.* Second Ave. RR., 72 N. Y. 542.

In others the rule is that the evidence may be withdrawn, and this is the doctrine of the Supreme Court in the above case. The withdrawal, however, must be explicit and not inferential, and the court must instruct the jury to disregard the evidence.

See above cases and also Hilliard on New Trials, 409.

IV.

Privileged Communications.

9th Error Assigned.

"It is a matter of law for the judge to determine whether the occasion of writing or speaking criminatory language, which would otherwise be actionable, repels the inference of malice, constituting what is called *privileged communications.*"

Cook *vs.* Wildes, 85 E. C. L. 328.
Taylor *vs.* Hawkins, 71 E. C. L. 307.
Shurtleff *vs.* Stevens, 51 Vt. 501.

In case of privileged communication malice must be proved, and therefore its absence must be presumed until such proof is given.

Somerville *vs.* Hawkins, 70 E. C. L. 583.
Simmons *vs.* Holster, 13 Minn. 249.

The rule as to what constitutes a *privileged communication* is thus stated by Blackburn, J., in Davies *vs.* Snead, 5 L. R. Q. B. 611:

> "That when a person is so situated that it becomes right in the interests of society that he should tell to a third person certain facts, then if he *bona fide* and without malice does tell them, it is a privileged communication."

Approved, Waller *vs.* Loch, 7 L. R. Q. B. D. 622.

The rule has also been stated thus:

> "A communication is privileged when made in good faith in answer to one having an interest in the information sought, and it will be privileged if volunteered when the party to whom the communication is made has an interest in it, and the party by whom it is made stands in such relation to him as to make it a reasonable duty, or at least proper, that he should give the information."

Sanderlin *vs.* Bradstreet, 46 N. Y. 191.
Lewis *vs.* Chapman, 16 N. Y. 369.
Bradley *vs.* Heath, 12 Pick. 163.
Mo. Pac. RR. Co. *vs.* Richmond, 73 Tex. 568.
Marks *vs.* Baker, 28 Minn. 162.

And this would be so, although the duty be not strictly legal, but of imperfect obligation to a person having a corresponding interest or duty.

Van Wyck *vs.* Aspinwall, 17 N. Y. 191.
Harrison *vs.* Bush, 5 El. & Bl. 344.

Moreover, the question is not whether the statements, contained in the letter of Leetch, are true or not, *as a matter of fact.*

> "All we have to examine is, whether the defendant stated more than what he believed, and what he might reasonably believe; if he stated no more than this he is not liable."
>
> Cockburn, C. J., in Spill *vs.* Maule, L. R. 4 Ex. 237.
>
> Davis *vs.* Snead, L. R. 5, Q. B. 608.
>
> Townsend on Libel, Sec. 241, p. 209.
>
> Maitland *vs.* Bramwell, 2 Fost. & Fin. 623.
>
> Chatfield *vs.* Comerford, 4 Fost. & Fin. 1008.

If a man *bona fide* writes a letter in his own defense, or for the defense and protection of his interests and rights, and is not actuated by any malice, that letter is privileged although it may impute dishonesty to another.

> Coward *vs.* Worthington, 7 Car. & P. 528.
>
> Townsend on Libel, Sec. 240.

V.

Authority of Leetch to Act for Company.

10th Error Assigned.

There is no evidence upon which the jury could find against the defendant, The Washington Gas Light Company, for the evidence is conclusive that no authority was delegated to Leetch other than such as pertained to the executive management of the works, the manufacture of gas and the *materiel* and *personnel* belonging thereto, and nothing else.

In addition to a board of directors, there were a president, secretary, assistant secretary, treasurer and general superintendent (the title under which Leetch is sued), and it will be assumed that in addition to the duties assigned to these

various officers, there must be a large residue of authority, undelegated, which could be exercised by the board of directors and the stockholders only. The necessities of the situation demand it.

From the authorities it is clear that the law demands as a prerequisite to the responsibility of the master for the servant's wrongful acts, that the particular matter (be it the driving of a carriage or a locomotive, the carrying out of the rules of the company or the investigating of the subordinates of a railroad company) in which the servant has done wrong shall be one which the master has *intrusted to the servant*; and the ground is, that for reasons of public policy he is chargeable with the duty and responsibility of selecting for each position a proper person to perform the duties intrusted to him.

In the leading case, Sleath *vs.* Wilson, 9 Car. & P. 607, quoted with approval by Justice Grier in Phila. & R. RR. Co. *vs.* Derby, 14 How. 468, Lord Erskine lays down the law thus:

> "It is quite clear that if a servant, without his master's knowledge, takes his master's carriage out of the coach house, and with it commits an injury, the master is not answerable, and on this ground, that the master has not intrusted the servant with the carriage; but whenever the master has intrusted the servant with the control of the carriage, it is no answer, that the servant acted improperly in the management of it. . . . The ground is, that he has put it in the servant's power to mismanage the carriage by intrusting him with it."

And in Railroad Co. *vs.* Derby (above), the court finds that—

> "The *intrusting* such a powerful and dangerous engine as a locomotive to one who will not submit to control and render implicit obedience to orders is itself an act of negligence, the *causa causans* of the mischief."

And in P. W. & B. RR. *vs.* Quigley, 21 How. at p. 210, Justice Campbell says:

> "The result of the cases is, that for acts done by the agents of a corporation, either *in contractu* or *ex delicto* in the course of their business and of their employment, the corporation is responsible as an individual is responsible under similar circumstances."
>
> Steamboat Co. *vs.* Brockett, 121 U. S. 637.

And in the case of Denver and Rio Grande RR. *vs.* Harris, 122 U. S. 587, the decision of the court was based directly upon the fact, that the Vice President and Assistant General Manager were *intrusted with the particular matter in hand*; the tort was committed "by an armed body of men, organized and under the command of its chief officers."

In each case, therefore, the question is one of fact, to be made out by the evidence. Was the act complained of done by the servant in regard to duties *intrusted to him to perform by the master*, or (to put the same idea in different words) was it in the line of his employment?

The only act with which the corporation can be charged is the letter of Leetch (R., p. 12); and the question above can be best answered by looking at the letter to which this was an answer (R., p. 10):

Under the circumstances, the law will undoubtedly stand firm upon the assumption that this is a situation, the key to which has not been *intrusted* to a treasurer, or to a secretary, or to an assistant secretary, or even to a president, and least of all, to one whose *line of employment* is the making of gas.

It may be in the *line of employment* of the vice president and the general manager to commit the corporation to responsibility for an assault and battery; it may be in *the line of employment* of the treasurer to commit the corporation o responsibility for forgery or arson; but very strict proof

should be demanded and enforced before such a departure from the regular, conventional, every-day *line of employment entrusted to such officials* is stamped with the seal of a court and dignified by its judgment.

The question in each case is one of proof of the fact that the particular act done was in relation to a duty entrusted to the official whose act it is alleged binds the company, and the company is entitled to all the assumptions of law that it conducts its business in the regular way, known and recognized by all who ever come in contact with corporations and deal with their officers in business.

> "A master is responsible for a wrongful act done by his servant in the execution of the authority given by the master and for the purpose of performing what the master has directed."
>
> Gray, C. J., in Hawes *vs.* Knowles, 114 Mass. 518.
> Fogg *vs.* B. & L. R. Co., 20 N. E. Rep. 109.
> Freeborn *vs.* Singer Sewing Machine Co., 2 Manitoba Rep. 253.
> So. Ex. Co. *vs.* Fitzner, 59 Miss. 581.
> Harding *vs.* Greening, 8 Taunt. 42.

In Carter *vs.* Howe Machine Company, 51 Md. 290–8, which was an action for malicious prosecution arising through the alleged false arrest of the plaintiff by the agent of the corporation, the court, after citing authorities, hold that to render the corporation liable for the acts of its agents—

> "It should be made to appear that the agent was expressly authorized to act by the corporation. The doing of such an act could not, in the nature of things, be in the exercise of the ordinary duties of the agent or servant entrusted with the company's money or goods; and before the corporation can be made liable for such an act it must be shown either that there was express precedent authority for doing

the act, or that the act has been ratified and adopted by the corporation."

Illinois Cent. RR. *vs.* Downey, 18 Ill. 259.
Isaacs *vs.* Third Ave. RR. Co., 47 N. Y. 122.

Had the Board of Directors taken action we might have had the *Quigley Case.* Had Leetch *been intrusted* with the whole policy of the company without regard to the limits of his own department we might have had the *Derby Case.* Had Lansden been ejected from the office by the janitor with unnecessary violence we might had the *Brockett Case.*

But, as it is, we have the case put by Lord Erskine, of a coachman who takes his master's coach out of the coach house without his knowledge, and with it commits an injury.

The evidence as to Leetch's duties and the matters *entrusted to him* is the following:

R. 37: John R. McLean, the president of the company, says:

> "That Leetch had no positive employment until after Mr. Lansden left; that witness does not think that he was put in exactly the position of Mr. Lansden; that in fact he was appointed generally to take care of the works and to do the best he could for the company; that he was a gas engineer and took care of the works."

CHARLES B. BAILEY, secretary, R. 40:

> "That it was the general practice of the office that correspondence of that sort shall first go to the secretary. (R. 42.) That the correspondence belonged to the secretary's office."

R. 42:

> "That in February, 1894, Mr. Leetch was general manager of the company; that he took the place of what used to be the engineer; that they have now

two engineers, one at each end, who are subordinate to Mr. Leetch; that every letter is not written from the secretary's office; that all letters relating to the engineer's department pretty much are written by the engineer or superintendent; that this matter as to the cost of gas was regarded as a matter belonging to the engineer's department; that witness does not think Mr. Leetch would have been the proper officer of the company to give the information which Mr. Brown wanted; that the letter would properly, if it was addressed to the company, have been answered from the secretary's office; that it was not answered from his office, because Mr. Leetch answered it himself; that that was a letter referring to the truth or falsity as to the cost of the production of gas; that most of the letters relating to the cost of the production of gas would properly come to the secretary's office."

R. 44:

"That the Brown letter came to Mr. Leetch; that it was shown to or read to the witness, but not handed to him, and he did not know it had been answered until he saw it in the Progressive Age; that he did not answer it as secretary, because it was out of his possession, that if the treasurer of the company should take a letter belonging to his department and keep it, witness would presume that he kept it for some purpose, and would probably wait until he handed it back again; that he would recognize his right to do that, and he would recognize the right of the general manager to take papers that he wanted to see which would come to him as secretary; that he has the right to take such papers (R. 45), but he does not answer letters that are outside of his particular line, as a general thing; that his right to answer any letters addressed to the company has never been officially denied; that if he wants to answer it, witness presumes he would. . . .

"Q. And has he also the right to answer letters?
"A. That would be a question.

"Q. Has it ever been questioned by your company?

"A. No; not officially.

"Q. He has always exercised the right to answer such letters as he saw fit?

"A. He does not answer letters that are outside his particular line, as a general thing.

"Q. Has his right to answer any letter to your company ever been denied to him?

"A. No.

"Q. If he wants to answer it he does it?

"A. I presume he would.

"Q. That was acquiesced in by your company?

"A. It never has been denied."

R. 46. WM. B. ORME:

"Records of the company as to the duties of the engineer." (R. 46, 47).

R., p. 50. JOHN LEETCH:

"He is at present the general manager of the Washington Gas Light Company and has had about eleven years' experience in the manufacture of gas . . . that the envelope in which that letter came was addressed 'John Leetch, Manager Washington Gas Light Company;' that the answer to that letter was written by the witness unaided, without the assistance of anybody; that it was a personal letter, and that he answered it as such . . . that the company had nothing to do with it; . . . that he did not write that letter in the performance of his duties as general manager; . . . that he simply wrote the letter to him and witness replied as a mere act of courtesy, outside of his duty as manager of the company."

R. 52:

"That none of the letters which have been read in evidence were written by him in his capacity as general manager of the Washington Gas Light Com-

pany; that it was a mere personal matter altogether, exclusive of any duty that he owed to the gas company."

R. 54:

"That sometimes where the letters have any bearing upon their duties—some inquiry about some matter that may refer to the gas business in general—he would talk with them and show them the letter; that he and Bailey talked together in that way . . . that he never noticed until less than a week ago that this letter was addressed to the Washington Gas Light Company."

R. 55:

"That he never opened a letter directed to the Washington Gas Light Company."

VI.

The Verdict Finding Only Part of the Issue Is Void.

12th Error Assigned.

The judgment must be reversed, because the jury found only part of the issue. The defendants, five in number, joined in the plea (R. 7); and then followed the joinder in issue.

The jury was sworn to try the whole issue, and not part of it. The verdict was against three, and silent as to the others. Such a verdict is void, and a judgment thereon will be reversed.

"If a verdict only finds part of what is in issue, it is bad, because the jury have failed in their duty, which was to find *all that is in issue.*"

Bacon's Abridgement: "Verdict" (M).

A *venire de novo* is grantable where the verdict finds less than the whole matter put in issue.

2 Tidd's Practice, 922.

"A verdict that finds part of the issue, and finding nothing for the residue, this is insufficient for the whole, because they have not tried *the whole issue* wherewith they are charged. As if an information of intrusion be brought against one for intruding into a messuage and a hundred acres of land, upon the general issue the jury finds against the defendant for the land, but saith nothing for the house, this is insufficient for the whole and so it was twice adjudged."

Coke upon Lyttleton, 226, 227.

"If the verdict omitted *anything within the province of a jury to find*, no judgment could be given and there must be a *venire de novo*."

Lord Mansfield in King *vs.* Dean, 3 T. R., 128.
Quoted and approved in U. S. *vs.* Watkins, 3 Cranch C. C. 575.

Thus it is seen that the invariable rule in England, according to the common law, is that if a verdict is confined to part only of the matter in issue it is void and a *venire de novo* must be granted.

This same principle is laid down by the Supreme Court of the United States as well as by the highest courts of the various States.

The leading case is that of Patterson *vs.* United States, in 2 Wheat. 221 (1817), where the court, through Washington, J., says:

"A verdict is bad if it varies from the issue in a substantial matter or if it find only a part of that which is in issue; and though the court may give form to a general finding so as to make it harmonize with the issue, yet if it appears that the finding is different from the issue, *or is confined to a part only of the matter in issue*, no judgment can be rendered upon the verdict. . . . The rule of law is precise upon this point. A verdict is bad if it varies from the issue in a substantial manner, *or if it find only a part of that which*

is in issue. The reason of the rule is obvious; it results from the nature and the end of the pleading. *Whether the jury find a general or a special verdict it is their duty to decide the very point in issue;* and although the court in which the cause is tried may give form to a general finding, so as to make it harmonize with the issue, yet if it appears to that court or to the appellate court that the finding is different from the issue or is confined to a part only of the matter in issue, no judgment can be rendered upon the verdict."

This case was approved and affirmed in Downey *vs.* Hicks, 14 How. 246, where McLean, J., says:

> "A verdict is bad if it varies from the issue in a substantial manner *or if it finds only a part of that which is in issue;* and if it appears that the finding is different from the issue or is confined to part only of the matter in issue, no judgment can be rendered upon the verdict."

Downey *vs.* Hicks, 14 How. 246 (1852).

The case of Patterson *vs.* U. S. was also approved in U. S. *vs.* Watkins, 3 Cranch C. C. 575, where Cranch, C. J., delivering the opinion of the court, quotes at length from the opinion rendered by Mr. Justice Washington (quoted above) and cites a number of cases in support thereof. In this case, the jury having failed to respond to the whole of the issue, the court held that a *venire de novo* must be awarded.

U. S. *vs.* Watkins, 3 Cranch C. C. 574–'6.

And again:

> "In Patterson *vs.* U. S., Judge Washington lays down the whole law precisely as we view it. . . . He says, 'Whether the jury find a general or special verdict, it is their duty to decide the very point in issue, and if it appears to that court or to the appel-

late court that the finding is different from the issue *or is confined only to a part of the matter in issue*, no judgment can be rendered on the verdict."

Garland *vs.* Davis, 4 How. 147.
Hodges *vs.* Easter, 106 U. S. 408, 418.
Browne *vs.* Browne, 22 Md. 103.
Ford *vs.* State, 12 Md. 515.
State *vs.* Carleton, 1 Gill. 250.

Eng. & Am. Enc., Title Verdict, Vol. 28, p. 285:

"Thus, also, if A, B and C be sued jointly by D, and a jury sworn to try the issues as to them all, a verdict finding the issues as to A and B only, and saying nothing as to B, would not be received, or a judgment rendered upon it would be reversed."

W. D. DAVIDGE,
R. ROSS PERRY,
Attorneys for Plaintiffs in Error.